Supreme Court, U.S.
FILED
04-596 SEP 3 - 2004
OFFICE OF THE CLERK

No. 04-___

IN THE

Supreme Court of the United States

WILLIAMS-RUSSELL & JOHNSON, INC.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

H.J.A. ALEXANDER *
ALEXANDER LAW FIRM, P.C.
2160 High Point Trail
Atlanta, GA 30331
(404) 346-0834

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

1) Whether the courts, in construing statutes, must give them their literal meaning.

2) Whether the rules of statute construction are applicable to the statutes set forth in the Internal Revenue Code.

3) Whether assessments after expiration of the period of limitation constitute overpayments which must be refunded pursuant to 26 U.S.C. § 6401, even if the payments by the taxpayer were made, before the expiration of the period of limitation, for taxes which were due except for the late assessment.

PARTIES TO THE PROCEEDINGS BELOW

The following persons have been involved in the proceedings:

1. Alexander, H.J.A., Alexander Law Firm, P.C. (Attorney for Plaintiff/Petitioner)
2. Aughtry, David, Chamberlain, Hrdlicka, White, William & Martin (Attorney for Plaintiff/Petitioner)
3. Nolet, John A. (Attorney for Defendant/Appellee)
4. Rowan, Bridget M. (Attorney for Defendant/ Appellee)
5. Tidwell, G. Ernest Hon. (U.S. District Judge)
6. United States of America (Defendant/Appellee)
7. United States Department of Justice
8. Wilcove, Michael N. (Attorney for Defendant/ Appellee)
9. Williams-Russell & Johnson, Inc. (Plaintiff/Petitioner)

RULE 29.6 STATEMENT

There is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	v-vii
TABLE OF AUTHORITIES	viii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF PERTINENT FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. THE LOWER COURT'S DECISION REFUSED TO FOLLOW THE ADMITTEDLY PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE AND REFUSED TO FOLLOW THE RULES OF STATUTORY CONSTRUCTION MANDATED BY THIS COURT	5
II. THE PLAIN LANGUAGE OF THE STATUTES AND THIS COURT'S STATUTORY CONSTRUCTION DECISIONS CLEARLY MANDATE THE REFUND AS A MATTER OF LAW	7

TABLE OF CONTENTS—Continued

Page

A. Assessments After Expiration Of The Period Of Limitation Constitute Overpayments Which Must Be Refunded 7

B. The Rules Of Statute Construction Establish Plainly That The Claim For Refund Is Timely 8

C. Because The Only Reasonable Construction Of § 6401 With § 6511 Shows That The Claim For Refund Is Timely, Respondent Ignored § 6401 In Moving To Dismiss This Action 11

D. The Cause Of Action For The Instant Lawsuit Arose When The IRS Illegally Assessed The Payments After The Statutory Period Of Limitation 12

E. The Plain Language Enacted By Congress In § 6401(a) Applies To Payments "Assessed *Or* Collected" After The Period Of Limitation 13

F. A Proper Construction Of § 6401 Results In Equal Treatment For All Taxpayers Where The IRS Makes Late Assessments Whether The Taxpayer Has Paid The Taxes Or Not. The Court Of Appeals Decision Rewards Taxpayers Who Don't Pay The Taxes When Due. Equal Treatment Is The Purpose And Effect Of A Proper Construction Of § 6401(a) 15

SUMMARY 16

CONCLUSION 17

TABLE OF CONTENTS—Continued

APPENDICES Page

Appendix A— Judgment of U.S. Court of Appeals (11th Cir) 1a

Appendix B— Opinion of U.S. Court of Appeals (11th Cir) 2a-7a

Appendix C— Judgment of U.S.D.C. (N.D. Ga.) 8a

Appendix D— Opinion of U.S.D.C. (N.D. Ga.) 9a-14a

Appendix E— Statutory Provisions Involved 15a-16a

Appendix F— Impossibility Chart 17a

Appendix G— Equal Treatment Chart 18a

TABLE OF AUTHORITIES

CASES — Page

Baral v. United State,s 528 U.S. 431 (2000) 9
Bonwit Teller & Co. v. United States, 283 U.S. 258 (1931 ..... 12, 13
Bowers v. United States, 226 F.2d 424 (5th Cir. 1955) 9
Market Co. v. Hoffman, 101 U.S. 112, 115 (1879) 7, 9
United States v. Freeman, 44 U.S. 556, 564 (845).. 9
United States v. Kaufman, 96 U.S. 567, 570 13
United States v. Savings Bank, 104 U.S. 728 13
Williams-Russell & Johnson, Inc. v. United States, 371 F.3d 1350, 1352 (11th Cir. Ga. 2004) 1, 6
Williams-Russell & Johnson, Inc. v. United States, 92 A.F.T.R.2d (RIA) 5772, 2003-2 U.S. Tax Case (CCH) P50629 (N.D. Ga. 2003 1

STATUTES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 7422(a) 4
28 U.S.C. § 1340 4
28 U.S.C. § 1346(a)(1) 4
26 U.S.C. § 6401(a) ..... *passim*
26 U.S.C. § 6402 ..... 5, 17
I.R.C. § 6402(a) ..... *passim*
26 U.S.C. § 6501 ..... 6, 16
26 U.S.C. § 6501(a) 9, 10
26 U.S.C. § 6511 ..... 11, 17
26 U.S.C. § 6511(a) 9, 10, 11
26 U.S.C. § 6513(b)(1) 10
26 U.S.C. § 6513(b)(2) 10

IN THE

Supreme Court of the United States

No. 04-___

WILLIAMS-RUSSELL & JOHNSON, INC.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-7a) is reported at 371 F.3d 1350 (11th Cir. Ga., 2004). The opinion of the District Court (Pet. App.-8a-14a) is reported at 92 A.F.T.R.2d (RIA) 5772, 2003-2 U.S. Tax Cas. (CCH) P50629 (N.D. Ga. 2003).

JURISDICTION

The court of appeals entered judgment on June 7, 2004. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

---

[1] The Appendix filed in connection with the Petition for Certiorari is cited herein as Pet. App-____.

STATUTORY PROVISIONS INVOLVED

– *See* Pet. App, -15a-16a.

STATEMENT OF THE CASE

On January 4, 2002 Williams-Russell & Johnson, Inc. (hereinafter referenced as "WRJ") filed its complaint against Respondent, United States of America seeking a refund of federal employment taxes for 1993 through 1995 in the amount of $3,554,536.37 plus interest. The underlying claim for refund was filed with the Internal Revenue Service ("IRS") on January 27, 2000, and clarified on May 30, 2000.

The parties filed cross-motions for summary judgment and Respondent also moved to dismiss the complaint contending that the claim for refund was untimely which deprived the District Court of jurisdiction. WRJ appealed the dismissal of the action, and the Trial Court's holding that the cross-motions for summary judgment are moot, to the 11th Circuit Court of Appeals. On July 7, 2004, the court of appeals affirmed. WRJ now petitions this honorable Court for writ of certiorari to correct the errors below.

SUMMARY OF THE PERTINENT FACTS

On March 24, 1999 the Internal Revenue Service ("IRS") issued Letter No. 3164 (01-1999) informing WRJ that it would be subjected to severe collection action because, according to the IRS, WRJ had not filed 941M returns for each of the twelve (12) months of 1993, 1994, 1995. During these periods WRJ was required to file Form 941Ms monthly instead of 941s quarterly. (Affidavit of Pelham Williams, III [R - Doc 14, Exh A]).

There were other returns which the IRS accused WRJ of not filing. However, those returns are not pertinent to this complaint. (Affidavit of Pelham Williams, III [*Id.*]).

Though the IRS on March 24, 1999 accused WRJ of not filing the subject returns, the IRS admitted that it was holding more than $6 million in suspense which had been received from WRJ, but was not allocated to any return or assessed. (Affidavit of Pelham Williams, III [*Id.*]).

WRJ insisted that the subject returns had been filed and refused to re-file returns thereby initiating fresh statute of limitation periods. Instead, WRJ initiated a time-consuming and burdensome search of warehoused records to retrieve copies of these returns dating back six (6) years. (Affidavit of Pelham Williams, III [*Id.*]).

Once the IRS realized that it would not be able to persuade WRJ into starting fresh statute of limitation periods, the IRS relented and admitted that it had the returns and that they had all been timely filed. (Affidavit of Pelham Williams, III [*Id.*]).

The IRS assessed the taxes for the subject returns during various dates in June, 1999, more than a year after the three (3) year statute of limitations had expired for each of the subject returns. (Affidavit of Pelham Williams, III [*Id.*]).

A claim for refund was filed by WRJ on January 27, 2000. Clarification of the claim for refund was communicated in writing on May 30, 2000. (Affidavit of Pelham Williams, III [*Id.*]).

An informal denial of the claim was received on May 22, 2000; followed by the June, 2000 abatements. (Affidavit of Pelham Williams, III [*Id.*]).

WRJ is entitled to a refund and/or credit for the following amounts plus interest:

941	Amount	941	Amount	941	Amount
1/93	$92,199.41	1/94	$87,268.90	1/95	$74,560.59
2/93	$101,578.23	2/94	$86,589.96	2/95	$76,950.41
3/93	$96,289.87	3/94	$86,563.88	3/95	$78,514.14
4/93	$120,219.55	4/94	$81,441.79	4/95	$86,169.50
5/93	$99,977.45	5/94	$90,765.53	5/95	$84,422.29
6/93	$97,648.24	6/94	$84,686.47	6/95	$120,567.48
7/93	$110,949.06	7/94	$89,524.16	7/95	$97,325.20
8/93	$103,320.05	8/94	$97,468.03	8/95	$93,382.56
9/93	$131,608.38	9/94	$92,315.90	9/95	$116,236.92
10/93	$119,176.05	10/94	$106,404.48	10/95	$91,906.54
11/93	$109,680.41	11/94	$102,114.63	11/95	$91,969.46
12/93	$105,833.56	12/94	109,024.41	12/95	$129,882.88
Total	$1,288,480.26	Total	$1,114,168.14	Total	$1,141,887.97

The total before interest is $3,544,536.37. (Affidavit of Pelham Williams, III [*Id.*]).

On January 4, 2002 WRJ filed its complaint against Respondent based upon 26 U.S.C.A. § 7422(a) which provides for actions by a taxpayer for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected and that the jurisdiction of the trial court is based upon 28 U.S.C.A. §1340 and 1346(a)(1), which provide that the District Court shall have original jurisdiction of any civil action arising under any act of Congress providing for internal revenue and for the recovery of any internal revenue tax alleged to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

SUMMARY OF ARGUMENT

The court of appeals admittedly disregarded the plain language of the statute and this Court's rules of statutory construction. The lower court concluded, contrary to the acknowledged express language of 26 U.S.C. § 6401(a) and § 6402, that late assessments do not constitute overpayments which must be refunded.

Courts of appeal cannot be permitted to disregard the plain language of statutes and the rules of statutory construction promulgated by this Court for interpreting and applying statutes. WRJ pleads that this Court grants the petition for writ of certiorari and reverse the erroneous decision.

ARGUMENT

I. THE LOWER COURT'S DECISION REFUSED TO FOLLOW THE ADMITTEDLY PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE AND REFUSED TO FOLLOW THE RULES OF STATUTORY CONSTRUCTION MANDATED BY THIS COURT. FOR THIS COURT TO ALLOW SUCH DISREGARD CHIPS AWAY AT THE VERY ABILITY TO GOVERN.

This case is of the highest importance as it affects Congress's and this Court's fundamental ability to govern. Congress and this U.S. Supreme Court cannot govern and fulfill its constitutional duties if the lower courts disregard the plain language of statutes duly enacted by Congress and the rules for construing statutes set forth by this Court. The court of appeals ". . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power", Rule 10(a), and ". . . has decided

an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

In the decision the court of appeals has refused to apply the expressed language of IRC § 6401(a). The decision admits that the unambiguous language of the code section statutorily mandates that the late assessment of previously paid taxes constitutes an overpayment:

> We must first decide whether § 6401(a) operated to create an "overpayment" of taxes. A literal reading of that statute supports WRJ's claim that an "overpayment" occurred. It provides that "'overpayment' includes that part of the amount of the payment of any internal revenue tax which is *assessed. . . after* the expiration of the period of limitation," 26 U.S.C. § 6401(a) (emphasis added), which in this case is § 6501. Again, the IRS did not assess WRJ's 1993-1995 tax liability until 1999.

(Emphasis in original). *Williams-Russell & Johnson, Inc. v. United States, Inc.* 371 F.3d 1350, 1352 (11th Cir. Ga., 2004). There is no dispute that § 6402(a) requires that overpayments must be refunded to the taxpayer.

Instead of following the acknowledged plainly expressed legislation, the court of appeals held at p. 1352,

> . . . [N]otwithstanding § 6401(a)'s language, an untimely assessment of taxes otherwise properly owed and paid within the statutory period for assessment and collection does not create an "overpayment" entitling the "late-assessed" taxpayer to a refund.

(Emphasis supplied).

The court of appeals, in no uncertain terms, refused to follow the clearly stated and admittedly unambiguous dictates of the law duly passed by the United States Congress. This refusal constitutes a ". . . depart[ure] from the accepted and usual course of judicial proceedings . . ." and ". . . [a decision of] an important federal question in a way that conflicts with

relevant decisions of this Court." The rule of statutory construction which the decision rejected is a well established cardinal rule as shown by this Court's ruling as far back as 1879.

> . . . We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Market Co. v. Hoffman, 101 U.S. 112, 115 (1879).

II. THE PLAIN LANGUAGE OF THE STATUTES AND THIS COURT'S STATUTORY CONSTRUCTION DECISIONS CLEARLY MANDATE THE REFUND AS A MATTER OF LAW.

A. Assessments After Expiration Of The Period Of Limitation Constitute Overpayments Which Must Be Refunded.

The code section provides, "Section 6401. Amounts treated as overpayments.

(a) Assessment and collection after limitation period.

> The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."

The claim for refund *sub judice* is for employment tax periods beginning with the 1st quarter of 1993 through the 4th quarter of 1995. With the exception of the 1st and 2nd quarters of 1993, Respondent admits that the "payment of [the] internal revenue tax. . . [in dispute] was assessed after the expiration of the period of limitation properly applicable thereto."[2]

Therefore, by the plain, clear and unequivocal language of I.R.C. § 6401(a) it is undisputed that the payments for the 3rd quarter, 1993 thru the 4th quarter, 1995 constitute overpayments as a matter of law.

In the very next section, I.R.C. § 6402(a), Congress mandated that overpayments be refunded (subject to the right to first apply the overpayment to certain outstanding taxes and debts not applicable here): "In the case of any overpayment, the Secretary . . . shall . . . refund any balance to such person."[3]

As shown, the law is clear and straightforward as to Respondent's obligation to refund the payments which were assessed after the period of limitation had expired.

B. The Rules Of Statute Construction Establish Plainly That The Claim For Refund Is Timely.

The rules of construction show clearly that the claim is timely.

> . . . We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be

[2] Respondent's District Court Brief, p. 3.

[3] The pertinent part of the section is quoted.

> superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Market Co. v. Hoffman, 101 U.S. 112 (1879).

As §§ 6401(a), 6402(a), 6501(a) and 6511(a) address the same subject, refund of overpayments, they must be read *in pari materia*.

> The Supreme Court thus expressed it: 'The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in pari materia are to be taken together, as if they were one law.'

Bowers v. United States, 226 F.2d 424 (5th Cir. 1955) citing *United States v. Freeman*, 44 U.S. 556, 564 (1845).

Section 6511(a) in pertinent part provides that the "[c]laim for refund of an *overpayment* . . . shall be filed by the taxpayer . . . within . . . 2 years from the time the tax was paid . . . ". (Emphasis supplied). Section 6401(a) statutorily defines *overpayment* to include late assessments. Therefore, for purposes of late assessments defined as overpayment pursuant to § 6401(a), the overpayment logically must be deemed to have been made on the date of the late assessment for purposes of § 6511(a).

Because of § 6401(a), WRJ had 2 years after the late assessment to file the claim for refund for ". . . that part of the amount of the [June, 1999 assessment] . . . ". The claim for refund was submitted on January 27, 2000; and under no circumstance later than May 30, 2000.

For payments to be deemed paid on a date after the actual date of payment is common in the tax system. *Baral v. United States*, 528 U.S. 431 (2000) ("The Court of Appeals looked to

§ 6513(b)(1), which states that amounts of tax withheld from wages "shall . . . be deemed to have been paid by [the taxpayer] on the 15th day of the fourth month following the close of his taxable year," and to § 6513(b)(2), which makes similar provision for amounts submitted as estimated income tax, and concluded that, under these subsections, both of the remittances at issue were "paid" on April 15, 1989 . . .").

This is the only logical construction which can be given to §§ 6401(a), 6402(a), 6501(a) and 6511(a) *in pari materia*.

The IRS must assess the taxes within three (3) years of the tax return being filed. I.R.C. § 6501(a).

In pertinent part § 6511(a) provides,

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . .

And § 6401(a) states,

> The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

And then § 6402(a) in pertinent part adds, "In the case of any overpayment, the Secretary . . . shall . . . refund any balance to [the person who made the payment]."

Since Congress has legislated that "The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation . . ." the look back period of § 6511(a) is undeniably intended to include the late assessment. Consequently, it naturally follows that the date

for the 'overpayment' resulting from the late assessment would be the date of the late assessment.

C. Because The Only Reasonable Construction Of § 6401 With § 6511 Shows That The Claim For Refund Is Timely, Respondent Ignored § 6401 In Moving To Dismiss This Action.

In advancing its argument that the claim for refund is not timely, Respondent completely overlooks I.R.C. § 6401(a) which is the spring board for the analysis of the issues at bar. Consequently, Respondent never addresses the obvious conclusions arising from § 6401(a). This is in patent violation of the cardinal rule of statute construction.

The following analysis shows that § 6401 is completely nullified unless the date of the expired assessment is deemed the date of the overpayment, which is only logical.

In the instant case, tax returns were deemed filed April 15, 1995 for the 1994 returns. Payments for those returns were deemed paid on April 15, 1995. The IRS had until April 15, 1998 to assess the taxes for those returns. According to § 6401(a) assessments made after April 15, 1998 constitute overpayments to be refunded pursuant to § 6402(a) and 6511(a).

Section 6511(a) states that the claim for refund must be filed ". . . within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . .". Therefore, according to Respondent, the claim had to be filed at the latest on April 15, 1998.

Of course, this is absurd because the § 6401(a) overpayment, as a matter of the plain language of the statute, could not arise until after April 15, 1998 (the date of the expiration of the period of limitation).

The claim for refund period, as urged by the IRS, of ". . . 2 years from the time the tax was paid . . . " expired April 15, 1997. This is a year before the statute of limitations expired on April 15, 1998. Obviously, the § 6401(a) overpayment, as a matter of the plain language of the statute, could not arise until after April 15, 1998 (the date of the expiration of the period of limitation).

The IRS's deadline for filing the claim for refund flies in the face of the plain language of § 6401, thereby completely nullifying the clearly expressed law set forth by Congress. According to the IRS's contention, there could never be a claim for refund for the 'overpayment' legislated in I.R.C. § 6401 as demonstrated by the following table:

Tax Year	Return Deemed Filed	3 year SOL Expired	Payments Deemed Paid	2 Year SOL Expired	Earliest Possible § 6401
1993	4/15/94	4/15/97	4/15/94	4/15/96	4/16/97
1994	4/15/95	4/15/98	4/15/95	4/15/97	4/16/98
1995	4/15/96	4/15/99	4/15/96	4/15/98	4/16/99

It is the assessment after the period of limitation which gives rise to the § 6401 claim. Therefore, as long as the assessment is made more than 3 years after the filing date for the return and the payment of the tax, according to the IRS interpretation, § 6401(a) is meaningless. *See* the Impossibility Chart - Pet. App.-17a.

D. The Cause Of Action For The Instant Lawsuit Arose When The IRS Illegally Assessed The Payments After The Statutory Period Of Limitation.

Similar to *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931) the cause of action in the instant case arose upon Respondent's assessment after the expiration of the period of limitation. *Bonwit Teller & Co.* involved a restatement of the

taxpayer's account after the expiration of the period of limitation for filing the claim for refund.

The IRS in *Bonwit* argued that

> . . . [N]o suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance, because here the claim was allowed. . .

The Supreme Court at p.265, rejected Respondent's argument stating,

> The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidence by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States v. Kaufman*, 96 U.S. 567, 570. *United States v. Savings Bank*, 104 U.S. 728. Bank of Greencastle's Case, 15 Ct. Cls. 25. There is no merit in the contention that the suit is barred.

Similarly, in the instant case, the cause of action for the claim for refund arose upon Respondent's assessment of the payments after the expiration of the period of limitation. Therefore, this action is for the overpayment arising from § 6401(a) in June, 1999.

E. The Plain Language Enacted By Congress In § 6401(a) Applies To Payments "Assessed *Or* Collected" After The Period Of Limitation.

There is no dispute that the statute says what it says. Respondent brazenly argues that the express unambiguous pronouncement of the United States Congress should be disregarded. There is no dispute that the faithful and true

application of the plain language of the statute requires denial of Respondent's motions and grant of WRJ's motion.

The court of appeals decision *sub judice* held on pp. 1352-1353 that payments after the period of limitation must be refunded. But payments **assessed** after the period of limitation which were paid before expiration of the period of limitation are not to be refunded.

Such a conclusion can be reached only by doing violence to the statute. § 6401(a) unambiguously states,

> The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed **or** collected after the expiration of the period of limitation properly applicable thereto.

(Emphasis supplied). The court of appeals admits that § 6401(a) makes the late assessment an overpayment. It plainly and unambiguously mandates that for purposes of refunds, the term 'overpayment' includes:

a. that part of the amount of the payment of any internal revenue tax which is assessed **or**

b. that part of the amount of the payment of any internal revenue tax which is collected

after the expiration of the period of limitation properly applicable thereto.

Congress could have stated that ". . . 'overpayment' includes that part of the amount of the payment of any internal revenue tax **[made after the period of limitation]** which is assessed **or** collected after the expiration of the period of limitation properly applicable thereto." (Emphasis supplied).

Or Congress could have substituted "and' for the "or" so that it read, ". . . 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is

assessed **and** collected after the expiration of the period of limitation properly applicable thereto." (Emphasis supplied).

Either of these rewrites would exclude payments made before the expiration of the period of limitation from the term 'overpayment'.

But Congress did not write it that way. The decision by the court of appeals judicially alters what Congress has plainly chosen to legislate. The court has held on p. 1352 that only payments made after the period of limitation has expired must be refunded.

F. A Proper Construction Of § 6401 Results In Equal Treatment For All Taxpayers Where The IRS Makes Late Assessments Whether The Taxpayer Has Paid The Taxes Or Not. The Court Of Appeals Decision Rewards Taxpayers Who Don't Pay The Taxes When Due. Equal Treatment Is The Purpose And Effect Of A Proper Construction Of § 6401(a).

A true application of the statute results in equal treatment of taxpayers whose taxes are not assessed timely. Compare the effect of application of the statute as enacted by Congress on 1) WRJ which paid the taxes in compliance with the law, and 2) Taxpayer X which has not paid taxes.

Assume that both owed $3.5 million. The IRS in dereliction of its statutory duty did not assess the taxes within the period of limitation. Respondent admits that it cannot collect the taxes from Taxpayer X.

Because § 6401(a) and § 6402(a) mandate refund of ". . . that part of the amount of the payment of any internal revenue tax which is assessed . . . after the expiration of the period of limitation . . . ", Taxpayer X will not be rewarded for failing to pay taxes as required by the law.

WRJ will be refunded the payments; thereby, resulting in equal treatment in comparison with Taxpayer X. Otherwise, unfair and unequal treatment is clearly shown. Taxpayer X who made no payments would be enriched by $3.5 million because it would be permitted to keep its money.

Whereas WRJ, which sought to obey the laws, according to Respondent's position, would be entitled to an abatement but no refund, leaving the noncompliant taxpayer enriched in comparison to WRJ. Such a position deprives the complying taxpayer the true benefit of the statute of limitations. Additionally, it rewards the IRS for reprehensible dereliction of duty. Law and justice will not support such a position.

Congress plainly intended to punish the government for not obeying the law and properly assessing the taxes. The IRS, in furtherance of the very negligent attitude which resulted in it collecting $6 million in a suspense account, now argues that assessment means nothing. It is merely a book-keeping function.

This belittles the express mandate of Congress as set forth in § 6501 and § 6401 which directs that the assessment must be made within the legislated period, or the tax must be refunded, or if payment has not been made, the tax cannot be collected.

These are harsh consequences mandated by Congress for what the IRS now dismisses as merely a bookkeeping procedure. In the instant case, it is undisputed that had the "bookkeeping" been handled as Congress ordered, the $6 million would have been applied to the tax returns and not suspended. *See* Equal Treatment Chart-Pet. App.-18a.

SUMMARY

Assessments after expiration of the period of limitation constitute overpayments which must be refunded. The rules of statute construction establish plainly that the claim for

refund is timely. Because the only reasonable construction of § 6401 with § 6511 shows that the claim for refund is timely, Respondent ignored § 6401 in moving to dismiss this action. The cause of action for the instant lawsuit arose when the IRS illegally assessed the payments after the statutory period of limitation.

Accordingly, because it is undisputed that the claim for refund was filed within 2 years after Respondent's June, 1999 assessment after the expiration of the applicable periods of limitation, the claim as a matter of law is timely.

CONCLUSION

This case is of the highest importance as it affects Congress and this Court's fundamental ability to govern. Congress and this U.S. Supreme Court cannot govern and fulfill its constitutional duties if the lower courts disregard the plain language of statutes duly enacted by Congress and the rules for construing statutes set forth by this Court. This is a case wherein the lower courts expressly disregarded both.

It is clear that the court of appeals ". . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" Rule 10(a) and ". . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

As admitted in the court of appeals decision, § 6401(a) indeed mandates that late assessments constitute overpayments. § 6402 legislates that overpayments must be refunded. No one has contended that this Court's rules of statutory construction do not apply to the internal revenue code. Therefore, the court of appeals is not free to disregard the literal meaning of the statute and the application of the statute to the facts of this case.

WHEREFORE, WRJ pleads that this honorable Court grants the petition for writ of certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

H.J.A. ALEXANDER *
ALEXANDER LAW FIRM, P.C.
2160 High Point Trail
Atlanta, GA 30331
(404) 346-0834

* Counsel of Record

November 10, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun 7, 2004]

No. 03-13868

District Court Docket No. 02-00010-CV-GET-1

WILLIAMS-RUSSELL AND JOHNSON, INC.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 7, 2004
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 7, 2004]

No. 03-13868

D.C. Docket No. 02-00010-CV-GET-1

WILLIAMS-RUSSELL & JOHNSON, INC.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before EDMONDSON, *Chief Judge*, HULL, *Circuit Judge*, and EDENFIELD*, *District Judge*.

EDENFIELD, *District Judge*:

I. Introduction

Appellant Williams-Russell & Johnson, inc. ("WRJ"), brought this action to recover from the internal Revenue Service ("IRS") an "overpayment" tax refund that WRJ claims it is due under 26 U.S.C. § 7422. The district court

---

* Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation.

dismissed the case for lack of subject-matter jurisdiction, finding that there was no overpayment and in any event the claim was time-barred. WRJ appeals.

In that the tax code can be difficult to follow, we first pause to explain the general framework that applies to this situation. Companies like WIU must pay employment taxes over time. The IRS is supposed to keep track of these payments and periodically make "assessments" which determine and inform taxpayers what they actually owe (ideally for both sides, this amount reflects what the taxpayer has paid, or thinks he should have paid).

But, the IRS makes mistakes, and so it does not always get around to timely assessing liability. The question for us, then, is what effect such a mistake (a late assessment) has on a taxpayer's liabilities and rights.

II. Background

During 1993-1995 WRJ filed monthly, rather than the usual quarterly, employment tax returns. Similarly, it deposited its employment taxes on a monthly basis. This required the IRS to, on a quarterly basis, consolidate the returns and make proper assessment of WRJ's tax liability. But the IRS failed to discharge those duties.

In fact, it did not assess liability for those years until 6/99. It concedes, then, that those 1993-1995 assessments were made beyond 26 U.S.C. § 6501's three-year statute of limitations period for collection and assessment.[1] So, the IRS admits, it cannot collect any additional employment taxes from WRJ even though WRJ had, in fact, underpaid its taxes

---

[1] 26 U.S.C. § 65 13(c)(1) provides that any return filed before 4/15 shall be considered as filed on 4/15. Accordingly, the last of WRJ's returns was "filed" on 4/15/96. Under § 6501, then, the IRS had until 4/15/99 to assess taxes for 1995, and one and two years earlier, respectively for 1994 and 1993.

for the subject years. *See Ewing v. United States*, 914 F.2d 499, 503-04 (4th Cir. 1990).

Not content with its goad fortune, however, WRJ wants more. Reasoning that it would have gotten away without paying anything had it simply not paid its taxes (because the IRS failed to timely make assessments for 1993-1995), it argues that late assessment also "entitles" it to recover those taxes it had already paid and otherwise owed during those years. In fact, it labels them "overpayments" within the meaning of 26 U.S.C. § 6402(a). In support, WRJ cites 26 U.S.C. § 6401(a), which provides that

> "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

Accordingly, WRJ applied for a refund—first on 1/27/00 and then again on. 5/30/00. But, the IRS denied tease claims on statute of limitations grounds—that since WRJ paid those taxes from 1994-1996, *see infra* note 2, it simply waited too long to try and get them back even if it is otherwise entitled to them because of the late assessment. In so doing, the IRS relied on 26 U.S.C. § 6511, under which claims

> for credit or refund of an overpayment of any tax . . . in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.

WRJ's year 2000 refund applications, then, placed it beyond the 2-3 year limit for recovering any 1993-95 "overpayments."

Unsatisfied, WRJ brought this refund action, arguing that, in light of § 6401(a)'s definition of "overpayment," § 6511's statute of limitation did not bar its recovery because the IRS

did not assess its 1993-1995 employment taxes until 6/99. In other words, no "overpayment" occurred until the IRS made its assessment in 1999, so it would be unfair to apply the 2-3 year limitations statute. Therefore, WRJ argues, the court should deem § 6511's statute of limitations tolled until 1999, thus making its 2000 refund claim timely.

III. Analysis

We review *de novo* subject-matter jurisdiction dismissals such as that which occurred here. *Broward Gardens Tenants Assoc. v. United States Env't Protection Agency*, 311 F.3d 1066, 1072 (11th Cir. 2002); *Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001).

We must first decide whether § 6401(a) operated to create an "overpayment" of taxes. A literal reading of that statute supports WRJ's claim that an "overpayment" occurred. It provides that "'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed . . . *after* the expiration of the period of limitation," 26 U.S.C. § 6401(a) (emphasis added), which in this case is § 6501. Again, the IRS did not assess WRJ's 1993-1995 tax liability until 1999.

But WRJ paid the taxes it now seeks to recover as the liabilities accrued (on a monthly basis from 1933-1995) well before the running of § 6501's limitation period. So the question, then, is whether those payments, properly owed and paid within the limitations period, somehow became "overpayments" merely because the IRS did not get around to assessing liability for them until after the limitations period expired.

While this is a first impression question for our circuit, others have consistently answered it in the negative. *See Ewing*, 914 F.2d at 500-04 {4th Cir. 1990); *Moran v. United States*, 63 F.3d 663, 666 (7th Cir. 1995), *overruled in part by Malachinski v. Comm'r*, 268 F.3d 497 (7th Cir. 2001);

Crompton & Knowles Loom Works v. White, 65 F.2d 132, 133-34 (1st Cir. 1933) (interpreting § 6401's predecessor statute). We join those circuits by holding that, notwithstanding § 6401(a)'s language, an untimely assessment of taxes otherwise properly owed and paid within the statutory period for assessment and collection does not create an "overpayment" entitling the late-assessed" taxpayer to a refund.

Under the principles established in *Lewis v. Reynolds*, 284 U.S. 281, 282 (1932), "a taxpayer's claim for refund must be reduced by the amount of the correct tax liability for the taxably year, regardless of the fact that the Commissioner can no longer assess any deficiency for the taxable year." *Bachner v. Comm'r of Internal Revenue*, 109 T.C. 125, 130 (1997), *aff'd*, 172 F.3d 859 (3rd Cir. 1995) (Table)). To accept WRJ's proposition—that it can recover undisputably owed taxes that have already been rightly and timely paid—would directly fly in the face of that tax jurisprudence.

Put another way, WRJ "owed taxes, and the government's failure to assess them timely does not change that fact." *Moran*, 63 F.3d at 666. We have been shown no convincing legal reason why WRJ should be allowed to recover what it owed and has already properly paid simply because the IRS was lax in it responsibilities. Section 6501 simply strips "the United States . . . [of] authority to collect [further] tax forcibly after the applicable period for assessment has expired." *Ewing*, 914 F.2d at 543-04. It does not mean that a taxpayer can recover taxes already correctly owed and paid.

Moreover, "an assessment is not a prerequisite to tax liability . . . only a formal determination that a taxpayer owes money. . . . It is more or less a bookkeeping procedure . . . but it is neither the beginning nor the end of tai liability." *Moran*, 63 F.3d at 666 (internal citation omitted). That the assessment here was made late therefore does not change the fact that the

taxes were justly owed and paid, so it would be nonsensical to allow a taxpayer to recover those taxes now.

Also, WRJ's attempt to distinguish *Lewis*, *Moran*, and other authority is unavailing. The technical factual distinctions pointed out by WRJ do not alter or render inapplicable the legal propositions on which we rely here, for they are based on policy considerations, not facts specific to those cases.

Finally, our conclusion that WRJ is not entitled to a refund by the operation of § 6401(a) obviates the need for us to rule on its argument that § 6511, the statute of limitations for the bringing a refund claim, should be tolled until the IRS made its assessment.[2]

IV. Conclusion

To summarize, if a taxpayer duly pays its taxes (even if in an amount latter determined to be deficient) but is not timely assessed for the same, then the IRS is barred from collecting any tax deficiencies. However, that same untimely assessment does not also entitle the taxpayer to a refund, unless, of course, it actually paid more than it owed (as indicated by the assessment) and timely files a refund claim. Accordingly, the judgment of the district court is AFFIRMED.

---

[2] We otherwise would find little merit to that argument. WRJ would have us equate the phrase "from the time the tax as paid" in § 6511(a) to § 6401(a)'s time of assessment or collection. A similar argument, however, was rejected in *United States v. Dalm*, 494 U.S. 596, 609 n. 7(1990) (the limitations clock runs from 'when a tax payment is tendered, not when it is determined that the tax is owed, *i.e.*, assessed). Indeed,

> [t]he most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:02-cv-10-GET

WILLIAMS-RUSSELL AND JOHNSON, INC.,
Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 22nd day of July, 2003.

LUTHER D. THOMAS
CLERK OF COURT

By: B. McIonnue
Deputy Clerk

Prepared, Filed, and Entered in the Clerk's Office
July 22, 2003
Luther D. Thomas
Clerk of Court
By: B. McIonnue
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Jul 21, 2003]

CIVIL ACTION
NO. 1:02-cv-0010-GET

WILLIAMS-RUSSELL AND JOHNSON, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

The above-styled matter is presently before the court on:

(1) defendant's motion to dismiss [docket no. 12-1];

(2) defendant's motion for summary judgment [docket no. 12-2];

(3) plaintiff's motion for summary judgment [docket no. 14].

On January 4, 2002, plaintiff filed this action against the United States to obtain a refund of federal employment taxes for 1993 through 1995 in the amount of $3,544,536.37, plus interest. Plaintiff amended its complaint on January 22, 2002. On October 10, 2002, defendant filed a motion to dismiss or, in the alternative, motion for summary judgment. Plaintiff filed a cross-motion for summary judgment on November 1, 2002.

Defendant's motion to dismiss.

Facts

For the years 1993, 1994, and 1995, the Internal Revenue Service ("IRS") required plaintiff to file employment tax returns on a monthly basis. During the relevant time period, plaintiff also made federal employment tax deposits on a monthly basis.

When employment tax returns are filed on a monthly basis, a revenue officer is required to consolidate the returns each quarter and ensure that the tax is assessed. The revenue officer assigned to collect plaintiff's liabilities, however, failed to do so.

On March 24, 1999, the IRS issued Letter No. 3164 (01-1999) related to the time periods at issue in this action. In response, plaintiff produced copies of the returns at issue.

In June 1999, the IRS assessed the taxes for the subject returns. The IRS later conceded that these assessments were made after the statute of limitations for assessments pursuant to 26 U.S.C. § 6501(a) had expired and abated the assessments.

On January 27, 2000, plaintiff's counsel wrote defendant requesting an abatement of the taxes which were assessed after the expiration of the limitations period. On May 30, 2000, plaintiff clarified that it was seeking a refund. The IRS, however, determined that there was no overpayment of tax for the relevant time periods and denied the plaintiff's request for a refund. Plaintiff then brought the instant action to obtain a refund.

Discussion

Defendant moves to dismiss plaintiff's action for lack of subject matter jurisdiction because plaintiff did not timely file a claim for refund with the IRS.

> Under settled principles of sovereign immunity, 'the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms.

United States v. Dalm, 494 U.S. 596, 608, 110 S. Ct. 1361, 1368 (1990) (internal citations omitted).

Plaintiff contends that this court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1340 and 1346(a)(1). Under § 1346(a)(1) a district court has jurisdiction over a "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. § 1346(a)(1).

A prerequisite for maintaining such a suit in court is the timely filing of a claim for refund or credit with the IRS. 26 U.S.C. § 7422(a); *Dalm*, 494 U.S. at 601, 110 S. Ct. at 1364. The time for submitting such a claim for refund or credit is set forth in 26 U.S.C. § 6511(a), which provides:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a).

The returns at issue in this case were deemed filed no later than April 15, 1996. *See* 26 U.S.C. § 6513(c)(1) (employment tax return filed by April 15 of succeeding year treated as having been filed on April 15). Likewise, the latest payment at issue in this case was deemed paid on April 15, 1996. See 26 U.S.C. § 6513(c)(2). Plaintiffs claim for a refund was filed on January 27. 2000. Therefore, by the time plaintiff filed this claim, the statute of limitations set forth in 26 U.S.C. § 6511(a) had expired on all the claims. Plaintiff argues, however, that the IRS failed to timely assess the taxes pursuant to 26 U.S.C. § 6501(a), which provides that "any tax imposed. . . shall be assessed within 3 years after the return was filed." 26 U.S.C. § 6501. Plaintiff further cites to 26 U.S.C. § 6401(a) which states: "(a) Assessment and collection after limitation period.—The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." 26 U.S.C. § 6401(a) (emphasis in original). Therefore, according to plaintiff, the right to the credit or refund for overpayment pursuant to 26 U.S.C. § 6401(a) did not arise until the time for assessing the particular taxes at issue expired pursuant to 26 U.S.C. § 6501(a). Thus, according to plaintiff, its claim is not barred by 26 U.S.C. § 6511(a).

Having reviewed and considered the arguments of plaintiff, the court finds them to be unavailing. "A payment of properly owed taxes within the statutory period for assessment is not an overpayment even if there is no formal assessment." *Ewing v. United States*, 914 F. 2d 499 (4th Cir. 1990). Furthermore, the United States Supreme Court has stated that "[t]he most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a

certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar." *Dalm*, 494 U.S. at 610, 110 S. Ct. at 1369, n. 7. *See Baral v. United States*, 528 U.S. 431, 437-39, 120 S. Ct. 1006, 1011 (2000) (finding taxes governed by a "deemed paid" provision were paid at time of remittance of estimated tax and not only when tax is assessed); *See also Dantzler v. United States Internal Revenue Service*, 183 F.3d 1247, 1251-52 (11th Cir. 1999)(remittance given to IRS not under protest would be considered to have been paid when the remittance was made and not when the assessment takes place). Where a claim for refund has not been filed or has been filed late, a court lacks subject matter jurisdiction over the refund suit. *See Dalm*, 494 U.S. at 608-09, 110 S. Ct. at 1368-69; *Vintilla v. United States*, 931 F.2d 1444, 1446 (11th Cir. 1991).

Therefore, in light of the foregoing, the court finds that the court lacks subject matter jurisdiction over this action inasmuch as plaintiff's claim was initiated after the applicable statute of limitations. Accordingly, defendant's motion to dismiss [docket no. 12-1] is GRANTED. Defendant's motion for summary judgment [docket no. 12-2] and plaintiff's motion for summary judgment [docket no. 14] are DISMISSED AS MOOT.

Summary

(1) defendant's motion to dismiss [docket no. 12-1] is GRANTED;

(2) defendant's motion for summary judgment [docket no. 12-2] is DISMISSED AS MOOT;

(3) plaintiff's motion for summary judgment [docket no. 14] is DISMISSED AS MOOT.

SO ORDERED, this 21st day of July, 2003.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, Judge
United States District Court

APPENDIX E

Statutory Provisions Involved

26 USC [1] 6401. "Amounts treated as overpayments.

"(a) Assessment and collection after limitation period.

The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."

I.R.C. § 6402(a). "Authority to make credits or refunds

"(a) General rule. In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e), refund any balance to such person."

I.R.C. § 6511. Limitations on credit or refund.

(a) Period of limitation on filing claim. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

---

[1] "26 USC" shall be reference herein as "IRC" as abbreviation for the "Internal Revenue Code".

(b) Limitation on allowance of credits and refunds.

(1) Filing of claim within prescribed period. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund.

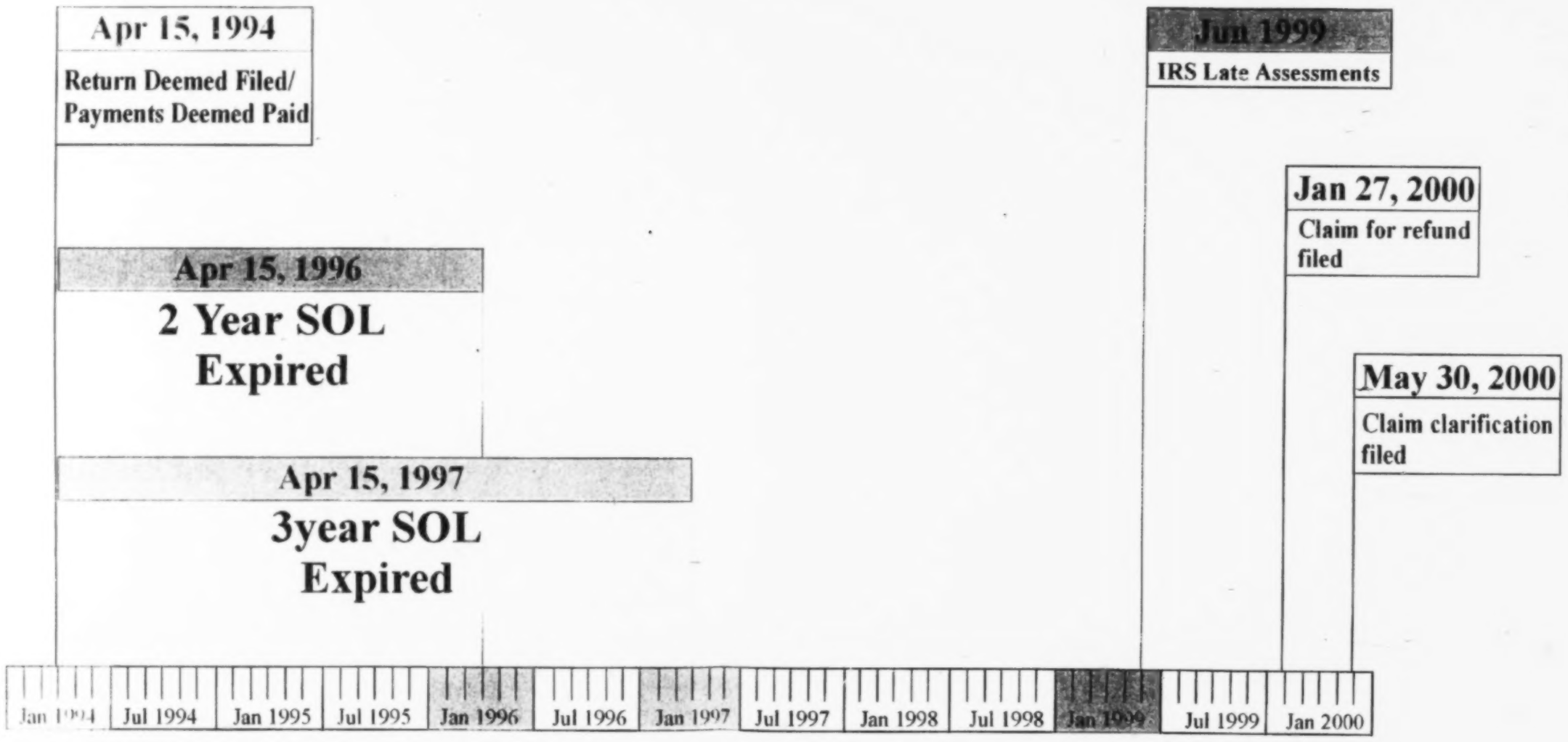
(A) Limit where claim filed within 3-year period. If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period. If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim

Impossibility Chart
(based on IRS contentions)

APPENDIX F

1993 Tax Returns



Appellant's Brief pp 2-4.

APPENDIX G

Equal Treatment Chart

(Appellant's Brief pp 2-4.)

	WRJ	Taxpayer X
Timely filed returns	Yes	Yes
Made timely payments on tax returns	Yes	No
IRS made late assessments	Yes	Yes
According to IRS, IRS keeps/collects taxes shown on returns	Yes	No